IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-264

EDWARD JOSEPH WEDELSTEDT,
Petitioner,

vs.

STATE OF IOWA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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Petitioner prays that a writ of certiorari issue to re..ew the judgment of the Supreme Court of Iowa entered March 22, 1978, on which rehearing was denied May 17, 1978.

CITATION TO OPINON BELOW

This Petition seeks review of the Iowa Supreme Court decision in the case of *State of Iowa* v. *Wedelstedt*, 263 NW2d 894 (Iowa 1978), printed herein as Appendix A. Rehearing was denied in an opinion reported as *State of Iowa* v. *Wedelstedt*, 265 NW2d 626 (Iowa 1978) printed herein as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Iowa was entered on March 22, 1978, and the Court subsequently denied Petitioner's request for rehearing on May 17, 1978. Jurisdiction to review this judgment by Writ of Certiorari is conferred on this Court by Title 28, United States Code, Section 1257(3). A sixty day stay of the remand was issued by the Iowa Supreme Court. Notice of this stay is printed herein as Appendix C. This stay was subsequently extended for an additional period of thirty days. Notice of this extension is printed herein as Appendix D.

QUESTION PRESENTED

Was take back entrapment established as a matter of law so that the submission of charges against Petitioner to a jury and the affirmance of Petitioner's conviction denied him due process of law as guaranteed to him by the Fourteenth Amendment?

CONSTITUTIONAL PROVISONS INVOLVED

UNITED STATES CONSTITUTION

Amendment XIV

§1. Citizenship defined — privileges of citizens — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Petitioner was charged with, and convicted by an Iowa jury, of having violated two provisions of the Iowa Criminal Code: aiding in concealing stolen goods in violation of Iowa Code, 1973, §712.1 and of conspiracy to conceal stolen goods in violation of Iowa Code, 1973, §719.1. The jury rendered its finding of guilt on February 10, 1976. After several post-trial motions were denied, the trial court sentenced Petitioner to consecutive terms in prison of five years on the substantive charge and three years on the conspiracy count. These convictions were upheld by the Iowa Supreme Court in the opinions which serve as bases for this Petition.

At trial, the substantial proof against Petitioner, and the evidence which serves as a foundation for Petitioner's claims herein, was provided by a police informer, Thomas Meade, who had been granted immunity from prosecution in return for his testimony. The essence of Meade's testimony is recited in the Iowa Supreme Court opinion reprinted in Appendix A. While this opinion, for the most part, accurately recites Meade's testimony, certain details on which the Iowa Supreme Court relied were not supported by the record. This lack of support constitutes the error complained of and delineated below.

At trial, Meade testified that, in September of 1974, he stole a valuable collection of classic movie films and trans-

ported the stolen property to Cedar Rapids, Iowa, where he gave it to Petitioner. The following month, criminal charges were filed against Meade by the State of Iowa for acts unrelated to the theft of the films. Motivated by desire to avoid imprisonment, Meade contacted an agent of the Iowa Bureau of Criminal Investigation (BCI) in an attempt to secure immunity from the criminal charges pending against him. In return for immunity from all crimes committed by him short of murder and perjury, Meade agreed to work with the BCI to furnish evidence of crimes committed by Petitioner.

During the time that Meade worked with the BCI, he wore a transmitter to record conversations with Petitioner. Several recorded telephone conversations between Meade and Petitioner were received in evidence at Petitioner's trial.

The testimony critical to the instant Petition concerned events occurring between December 12 and December 15, 1974. During this time, Petitioner was in Las Vegas, Nevada, and Meade was in Iowa. This testimony related to an attempt by Petitioner and Meade to sell the stolen films to a purchaser who had been created by the BCI. At trial, the direct testimony of these events consisted of the playing of numerous recordings of telephone conversations between Petitioner and Meade (Transcript pp. 132-161). After several of these conversations, on December 15, 1974, Meade took a truck which had been given to him by the BCI and drove it to Petitioner's farm (Tr., p. 168, Appendix E, p. 21). The stolen film was loaded on this truck, at which time Meade took sole possession of the truck and the films and drove to a rendezvous with BCI agents (Tr., p. 169, Appendix E, p. 22). Meade then arranged for a meeting between the prospective purchaser and an employee of Petitioner named Gentry. When Gentry and another employee brought these films to the "purchaser", they were arrested. Petitioner's arrest occurred later.

The most critical testimony concerned whether Meade had sole possession of the stolen films, whether Petitioner gave Meade the location of the films and whether he instructed Meade to dispose of them on December 15. This testimony was elicited on cross-examination and is contained in Appendix E. In this testimony, Meade stated that, between December 13 and December 15, he conducted several telephone conversations with Petitioner who was in Las Vegas. Meade stated that he did not know the location of the films until he was told to get them by Petitioner and by a Mr. Karr (Tr., p. 196, Appendix E, p. 24). Meade stated that this instruction by Petitioner was contained on one of the tapes admitted into evidence (Tr., pp. 196-197, Appendix E, pp. 24-26). Meade also stated that he learned of the whereabouts of the films not from Petitioner but from Mr. Karr (Tr., p. 197, Appendix E, p. 25).

Meade testified that he was acting, during this time, pursuant to the instructions of BCI agents (Tr., pp. 197-199, Appendix E, pp. 25-29). Further, after having obtained these films, Meade had them in his sole possession without the knowledge of Petitioner (Tr., p. 201, Appendix E, p. 30) and ultimately consigned them to the custody of the BCI (Tr., p. 198, Appendix E, p. 26).

Meade based his contention that Petitioner had directed him to pick up the stolen films on a telephone conversation which occurred on December 15, 1974, and which

was admitted as Exhibit H at trial. This transcript is printed in relevant part as Appendix F.

At the close of the prosecution's case, Petitioner moved to dismiss both counts against him based on a claim that the state's evidence disclosed as a matter of law that, based on the Iowa doctrine of "take back" entrapment, Defendant had been entrapped into the commission of both of the charged offenses. (Appendix G). This motion was renewed at the close of all proof and was denied by the Court (Appendix H).

On appeal, Petitioner renewed his claim that the trial court erred by refusing to rule that, as a matter of law, Petitioner had been entrapped. The Iowa Supreme Court, in upholding Petitioner's conviction, rejected Petitioner's "take back" entrapment claim. *State of Iowa* v. *Wedelstedt*, 263 NW2d 894 (Iowa 1978), rehearing denied 265 NW2d 626. This rejection serves as the basis for the instant Petition.

REASONS FOR GRANTING THE WRIT

PETITIONER'S CONVICTION, IN THE ABSENCE OF ANY EVIDENCE NEGATING ENTRAPMENT AS A MATTER OF LAW, VIOLATES HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

Throughout the course of the proceedings against him, Petitioner has maintained that the evidence against him established entrapment as a matter of law. This claim was founded on the principle of "take back" entrapment enunciated by the Iowa Supreme Court in *State* v. *Overmann*, 220 NW2d 914 (Iowa 1974). Citing a line of cases propounded by the Fifth Circuit Court of Appeals, the *Overmann* Court held that:

> If an accused produces evidence disclosing (1) the government, through an agent or informer, supplied drugs to defendant, and (2) the government, through an agent or informer, later reappropriates any of those drugs from the accused, then a "take-back entrapment" is shown. Under those circumstances the State must come forth with evidence which contradicts either of the above two elements. *In event the State fails to so do then an accused is entitled to dismissal as a matter of law.* If, however, the State does produce evidence sufficient to create a fact issue as to a "take-back entrapment" the case should be accordingly submitted to the jury. See *United States* v. *Oquendo*, 490 F.2d at 164; *United States* v. *Bueno*, 447 F.2d at 906.
>
> 220 NW2d at 917 (Emphasis supplied).

Petitioner asserted that the State's own evidence established that Meade supplied the stolen films to Petitioner's accomplice, Gentry, reappropriated them on December 15 and then returned them to Petitioner's employees. After Meade returned the films, the BCI set up a "purchase" and arrested Petitioners after his employees, Gentry and Leone, attempted to complete the transaction. The State responded to this argument by claiming that "Meade's capacity as a BCI informer at the same time he, as defendant's agent, executed defendant's instructions, does not import the State had possession of the films." 263 NW2d at 900.

In adjudicating this issue the Iowa Supreme Court stated:

> The key question is Meade's capacity when he took the films from defendant's farmhouse to the Cedar Rapids motel to await Gentry and Leone as they flew in from St. Louis. Did Meade then have possession of the films as a BCI agent or did he have possession as defendant's agent? *Id.*

The Court answered this question as follows:

> On the record we believe Meade was acting under consistent instructions both from defendant and from the BCI. Under the circumstances a factual issue was generated. The jury was clearly entitled to find the government never came into possession of the goods at the critical time as a result of Meade's involvement. It was in no way prejudicial to defendant to submit the question to the jury. *Id.* at 900-901.

The Court's holding that Meade, in taking possession of the films, was acting pursuant to instructions from both Petitioner and the BCI was founded on its factual determination that:

> On December 15, 1974, defendant, from Las Vegas, told Meade to go to defendant's farm outside Cedar Rapids where the films were located. *Id.* at 897.

Petitioner, in seeking a rehearing, challenged the factual basis for this finding. Petitioner argued that the record failed to support such a finding and asked the Court to specify the portion of the record supporting the challenged finding of fact. In response, the Court stated:

> In view of the agency relationship existing between defendant and Meade the finding complained of is perhaps of not controlling importance. In any event the evidence, taken in the light most favorable to the verdict, discloses the jury could have made such a finding. It is elementary the jury is at liberty to take and reject from the testimony of various witnesses as it chooses.
>
> Defendant testified that he 'got' the location of the films when both a Mr. Karr and defendant told him to go there. Meade testified his belief the tape recording of the phone conversation would disclose this. (Tr., pp. 196-197) Defendant cannot rely on the tapes to withdraw this testimony. The tapes were at parts inaudible. Moreover the jury could believe Meade was right in his testimony but wrong in his stated belief the conversation was recorded on the tape. 265 NW2d at 627.

It is Petitioner's contention that, in these opinions, the Iowa Supreme Court created an issue of fact where none existed in the record. Because the evidence presented by the State established entrapment as a matter of law and because no evidence was presented to refute this entrapment, Petitioner's conviction violated his due process rights as guaranteed to him by the Fourteenth Amendment to the United States Constitution. The question of entrapment should never have been submitted to the jury. That jury's finding of guilt belies the Iowa Supreme Court's gratuitous contention that "it was in no way prejudicial to defendant to submit the question to the jury." 263 NW2d at 901.

The decision of the Iowa Supreme Court violates pre-

cepts established by this Court in two lines of cases. *Sorrells* v. *United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932) represents the seminal case in the first line of relevant authority. In *Sorrells*, this Court first recognized and sustained the validity of the entrapment defense. In exploring the foundation of this defense, the *Sorrells* Court created the so-called "subjective-objective" dichotomy. The majority opted for a subjective approach, one which focuses on the conduct and propensities of each defendant so that only the "unwary innocent" will be protected. The objective approach promoted by the *Sorrells* concurrence disregards a defendant's intent and focuses on the nature of police conduct. Pursuant to the objective approach, no matter what a defendant's record or criminal animus, courts should not countenance certain police conduct whose existence is deemed detrimental to society.

Both tests for entrapment may prompt a trial court to find entrapment as a matter of law. However, this limitation on the role of a jury is greater where the objective test is utilized than where the subjective test, which involves factual questions concerning a defendant's mental state, is used. A ruling under the objective test, as Mr. Justice Roberts urged in the *Sorrells* case, being aimed at blocking off areas of impermissible police conduct, is consigned to the court and not the jury:

> The protection of its own functions and the preservation of the purity of its own temple belongs to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.
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> 287 U.S. at 457 (separate opinion).

This critical role entrusted to trial and appellate courts under the objective entrapment test is important and controlling herein because the Iowa Supreme Court, in *State* v. *Mullen*, 216 NW2d 375 (Iowa 1974) adopted that test as the law of Iowa.

While this Court is generally loath to interfere with a state court's enforcement of its own doctrines, its opinions have also demonstrated an alacrity in assuring that such doctrines are enforced in a manner which does not violate due process of law. See, e.g. *Raley* v. *Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). This is especially so in those cases in which this Court has reversed state court convictions which it found to be unsupported by the trial court record. In *Thompson* v. *City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), the initial decision in this second line of relevant precedent, this Court held that a conviction on charges "totally devoid of evidentiary support" constitutes a violation of the Fourteenth Amendment Due Process Clause. The *Thompson* Court required that all elements of a charged offense be supported by the evidence. *Id.* at 204. Later, this Court made it manifest that:

> It is beyond question, of course, that a conviction based on a record lacking *any relevant evidence as to a crucial element* of the offense charged would violate due process. *Vachon* v. *New Hampshire*, 414 U.S. 478, 480, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974) quoting

> *Harris* v. *United States*, 404 U.S. 1232, 1233, 92 S.Ct. 10, 30 L.Ed. 425 (1971) (Opinion in Chambers) (emphasis supplied).

Accord, *Johnson* v. *Florida*, 391 U.S. 596, 88 S.Ct. 1713, 20 L.Ed.2d 838 (1968). See generally, Comment Note — *Lack of Evidence Supporting State Conviction of Criminal Offense as Violation of Federal Due Process.* 15 L.Ed.2d 889 (1965).

These two lines of authority coalesce in the instant case to require the granting of this Petition. As is readily apparent from the decisions of the Iowa Supreme Court, Petitioner's conviction rested entirely on a finding that the evidence presented a factual question as to Meade's role in taking possession of the stolen films and redelivering them to Petitioner's employees. If the record demonstrates that Meade was under the sole control of the BCI, take back entrapment was established as a matter of law. If, as the Iowa Supreme Court held, the record presents a question of fact as to whether Meade was acting pursuant to concurrent instructions by Petitioner and by the BCI, the charges against Petitioner were properly submitted to the jury.

Initially, the believability and logic of the Iowa Supreme Court's statement that "Meade was acting under consistent instructions both from defendant and from the BCI" is suspect on its face. At every step in the disposition of the films, Meade was acting as a BCI puppet. The record manifests Meade's constant contact with and instructions from the BCI. The BCI provided him with a truck onto which he was to load the films (Tr., p. 196, Appendix E, p. 24). Meade took samples of the films to the BCI before

taking sole possession of them (Tr., p. 197, Appendix E, p. 25). The BCI told Meade where to park the truck after he had obtained the films and watched the truck while Meade conferred with BCI agents (Tr., p. 198, Appendix E, p. 26). As such, *the BCI itself took possession of the* films, exclusive of *Meade's activity.* BCI agents directed Meade to call Petitioner and direct him to a specific rendezvous point (Tr., pp. 199-200, Appendix E, pp. 27-30). At this time, Petitioner had no knowledge of the films' location (Tr., p. 201, Appendix E, p. 30).

It cannot be seriously argued that, if Petitioner had given Meade instructions contrary to those given by the BCI, Meade would have obeyed Petitioner. This concept of dual agency was rejected by this Court in *Sherman* v. *United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). There, the Government contended that it should not be bound by the actions of an informant, Kalchinian, who had undertaken to entrap Defendant. This Court, in firmly rejecting this characterization, stated:

> *The Government cannot disown Kalchinian and insist it is not responsible for his actions.* Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions. Undoubtedly the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced.
>
> * * *
>
> In his testimony the federal agent in charge of the case admitted that he never bothered to question

> Kalchinian about the way he had made contact with petitioner. *The Government cannot make such use of an informer and then claim disassociation through ignorance.* 356 U.S. at 373-375 (Emphasis supplied) (footnote omitted).

Just as in *Sherman*, the government agent in the instant case was operating under the threat of criminal charges. The fact that Meade, unlike the *Sherman* informer, was operating pursuant to explicit police instructions makes this Petition a more compelling matter than that on which this Court predicated its reversal in *Sherman*. Even absent such precedent, common sense dictates a rejection of any theory making Meade an agent for both the BCI and for Petitioner. The record makes manifest his true allegiance. Such a creative doctrine cannot provide critical evidence which is not present in the record.

Even accepting, arguendo, the Court's dual agency theory, a review of the record further discloses that the critical fact on which the Iowa Supreme Court relied — Petitioner's order that Meade pick up the films — is, indeed, missing from the record. In an involved record of a four-day trial, the Iowa Supreme Court could cite only one sentence to create a question of fact for the jury. The passage on which the Court below relied was a statement by Meade, made not on direct but on cross-examination, one immediately contradicted by him and one impeached by the very tape recording on which it relied. On direct examination, Meade never claimed that Petitioner had ordered him to pick up the films. Instead, the State relied entirely on transcripts of telephone conversations between Petitioner and Meade. Nowhere in these transcripts was any such order contained.

Later, on cross-examination, Meade stated:

Q. Well, how did you happen to get to that location of the films? Did somebody tell you to go there?

A. Yes, Mr. Karr did and Mr. Wedelstedt.

Q. *And did Mr. Wedelstedt tell you that on the tapes?*

A. *I believe so.* I told him that I was going out there. I told him I had the truck and I was taking it out there to meet with him, so we did discuss it on the tapes.

(Tr., pp. 196-197, Appendix E, p. 25)
(Emphasis supplied).

Immediately thereafter, Meade contradicted himself:

Q. And at least from the night you told him you were going to, Mr. Wedelstedt never told you where the tapes were at?

A. Where the films were?

Q. You learned this from Mr. Karr?

A. Yes.

Q. You learned that on Saturday night?

A. *I learned it on Sunday morning.* Saturday night, Mr. Karr said, 'Meet me out there.' I didn't know where the films were.

(Tr., p. 197, Appendix E, p. 25)
(Emphasis supplied).

The transcript which Meade believed corroborated his testimony and on which the State relied on direct examination was introduced as Exhibit H and is reprinted, in relevant part, as Appendix F. Not only does this tape of their Sunday morning conversation not support Meade's claim, but it contradicts his testimony:

> Meade: My feelings — why should I tell the guy to forget the deal? I know, you know, the guy's here with the money *and I got the film.*
>
> Defendant: *You don't know where that films at.*
>
> Meade: Huh? *Who don't know where it's at? I've got it all.* You better call Dale and check.
>
> (Appendix F, pp. 33-34)
> (Emphasis supplied).

This transcript bespeaks only one reading. Petitioner believed that Meade did not know the location of the stolen films. Meade informed Petitioner that he (Meade) not only knew the location but actually had the films in his possession. It strains credulity to believe that Petitioner would order Meade to pick up films which Meade already had in his possession.

The Iowa Supreme Court, in assessing this evidence stated:

> Defendant testified that he 'got' the location of the films when both a Mr. Karr and defendant told him to go there. Meade testified his belief the tape recording of the phone conversation would disclose this (Tr., pp. 196-197). Defendant cannot rely on the tapes to withdraw this testimony. The tapes were at parts inaudible. Moreover the jury could believe Meade was right in his testimony but wrong in his stated belief the conversation was recorded on the tape. 265 NW2d at 627.

This holding ignores the clear record and constitutes an abandonment of the Court's duty under an objective entrapment test. The State produced the transcripts and, as such, vouched for their validity. These transcripts were introduced as a recording of the complete conversation between Meade and Petitioner. Further, the inaudible portions occur in sections unrelated to a discussion of moving the films.

Moreover, allowing a jury to believe that such inaudible portions might support Meade's testimony violates principles of law and of logic. The audible portions clearly demonstrated that, at a time when Petitioner was supposed to have ordered Meade to pick up the films, Meade already had possession of them without Petitioner's knowledge. Allowing a jury to use the inaudible portions to corroborate Meade's testimony violates the presumption of innocence accorded Petitioner, as well as the presumptions of caution with which Iowa jurors are required to treat accomplice and informer testimony. See Iowa Code, 1973, §782.5, *State* v. *Anderson*, 38 NW2d 662 (Iowa 1949).

Although this Court will not upset a state court determination where some evidence is present to support it, two cases demonstrate that, where such evidence is inherently incredible, this court will act to protect a Defendant from a due process violation.

In *Garner* v. *Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961), a defendant, in appealing his state court conviction for disturbing the peace, claimed that the conviction was unsupported by the evidence and, therefore, violated his due process rights under *Thompson* v. *Louisville, supra.* The appeal devolved into a question of whether any evidence existed to prove that Defendant had acted "in such a manner as to unreasonably disturb or alarm the public." One witness, the manager of the store in which Defendant had staged a protest, had testified that he had called police because he feared such a disturbance. 368 U.S. at 171.

Despite this Court's claim that it will not test the sufficiency of evidence in a state court proceeding, *Thompson* v. *Louisville, supra,* at 191, the *Garner* court totally rejected this testimony as "completely unsubstantiated by the record." 368 U.S. at 171. Having detailed the other evidence which impeached the manager's testimony, the court held:

> Under these circumstances, the manager's general statement gives no support for the convictions within the meaning of *Thompson* v. *Louisville* (US) supra. *Id.* at 172.

Similarly, in *Sherman* v. *United States, supra,* this Court held that the question of entrapment should not have been submitted to the jury despite the Government's claim that the jury could have interpreted Defendant's caution not as the absence of predisposition to commit the crime but "as the natural wariness of the criminal." 356 U.S. at 375. *Cf. Masciale* v. *United States*, 356 U.S. 386, 78 S.Ct. 827, 2 L.Ed2d 859 (1958). Thus, where, as here, the record discloses limited, unsubstantiated evidence which a state

court has used to create a jury question, this Court will act to vouchsafe a state defendant's due process rights and review that record.

It must be granted that an entrapment claim based on a state law doctrine presents many reasons for this Court's refusal to intervene. Certainly, the record reveals that Petitioner is not an unwary innocent or a civil rights protestor. The record manifests his illegal motives. Nonetheless, where state courts establish a legal doctrine, they must enforce such a precept uniformly without regard to whether that person who asserts it is "good" or "bad."

Here, the Iowa Supreme Court, in thoroughly-reasoned decisions, adopted the objective test for entrapment and embraced the doctrine of "take back" entrapment. It then found an unpopular defendant attempting to utilize these theories. Rather than uniformly applying the law to this Petitioner, the court below sought, and found, gossamer evidence in the record to uphold his conviction. Petitioner now asks that this Court, as it did in *Garner* and *Sherman*, review these rulings and guarantee him due process and uniform enforcement of the law under the Fourteenth Amendment.

CONCLUSION

For the reasons detailed above, Petitioner respectfully requests that, pursuant to this Court's supervisory power, this Petition be granted.

Respectfully submitted,

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